No. 02-725

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARIA PULICE,
Petitioner,

v.

OFFICER J. ENCISCO; SGT. T.M. SOLLA; OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR.; in their capacity as police officers and individually; ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency; ALLEGHENY TOWNSHIP, a municipal corporation; PEOPLE'S NATURAL GAS COMPANY, a Pennsylvania corporation; PAUL E. KING, a Pennsylvania State Trooper,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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PERCEIVED MISSTATEMENTS OF FACT

Petitioner fails to point out that a bystander videotaped the incident in question. Both Petitioner and Respondents relied on this videotape evidence at the trial level and before the Third Circuit Court of Appeals. The videotape shows two days of discussion between the Pulices, the gas company employees and the Allegheny Township Police Officers. The Pulices can be seen and heard arguing vehemently with the police about whether the gas company had the right to work on the property. Donald Hess repeatedly asks the Pulices to step aside and permit the gas company to perform its work. On December 5, 1997, after a period of discussion, Donald Hess advises Maria Pulice, Nunziato Pulice, Sr. and Nunziato Pulice, Jr. that if they do not move, they will be arrested. Nunziato, Jr. can be heard arguing with the police and questioning how he can be arrested since he is on his property. When the Pulices refuse to move, the officers proceed to take them into custody, beginning with Nunziato Pulice, Sr. As the police attempt to remove him from the scene, Petitioner is seen on the videotape attempting to pull him back, making it more difficult for the officers to control the scene and to arrest Mr. Pulice. Once the officers remove him from the immediate area, Petitioner climbs up the hill behind one of the officers who is attempting to remove her son from the hill. Petitioner appears to search for something and then one of the officers, with a shocked and surprised look on his face, yells, "She's got my gun!" Petitioner is then removed from the hill, placed face down on the ground and handcuffed. At no time did any of the officers strike Petitioner. A brief period of time exists where Petitioner cannot be seen on the videotape. However, she can be heard yelling that she wants up and that the police will not let her get up. When Petitioner reappears on the video, she has no visible signs of injury. This is contrary to Petitioner's claims that she was severely beaten.

In addition, Petitioner's medical records do not support her claims that she was severely beaten. It should be noted that both Petitioner and Respondents relied upon Mrs. Pulice's medical records in making their argument to the lower courts.

There is a significant history that led to the incident in question that is not mentioned in Petitioner's statement of the facts. Petitioner and her husband had a dispute with their neighbors concerning the presence of a gas line that ran across the Pulices' property and provided gas service to the neighbors. Peoples Natural Gas Company has an easement for the gas line located on or near the property in question. The Pulices' predecessor in interest granted the neighbors the right to have constructed a domestic high-pressure regulator and meter installation and the right to lay a service line from the said installation across the property to the neighbor's property line. This agreement, dated October 18, 1976, also permitted the gas company a right of ingress and egress to service the installation and read the meter. The Deed of Exchange, which conveyed the property to the Pulices, clearly states that the conveyed premises were subject to a right of way for gas lines servicing the dwelling of the neighbors. A gas meter is located in the area in question. Prior to 1992, the Pulices attempted to prevent the gas company from gaining access to the gas line and meter by covering the gas meter with a wooden box. The Pulices further threatened to forcibly remove from the property any gas company employee who attempted to read or service the meter. This conduct resulted in litigation that was appealed all the way to the Pennsylvania Supreme Court. Pennsylvania's courts held that the Pulices had notice of the easement and that they were enjoined from what the Superior Court of Pennsylvania termed their "petty behavior". *The Peoples Natural Gas Company v. Pulice*, 447 Pa.Super. 644,

668 A.2d 1204 (1995), *alloc. denied*, 544 Pa. 611, 674 A.2d 1074 (1996).

Petitioner and her husband were dissatisfied with the decisions of the courts and so, in a self-help measure, Mr. Pulice cut the gas line, leaving the neighbors without gas service. As a result, gas company employees arrived on December 4, 1997 to reconnect the gas service. Petitioner and her family physically obstructed the area to prevent the gas company from performing its work. Allegheny Township police officers were called to the scene and after a significant period of discussion, the gas company left for the day and no work was performed. At some point, the Allegheny Township solicitor was advised of the situation. The solicitor contacted Petitioner's attorney at the time and advised him that the gas company was conducting operations in the public right-of-way of Copeland Road and instructed him to direct the Pulices not to interfere with the gas company's activities. He also indicated that interference with the gas company's activities could subject the Pulices to arrest. The solicitor also advised the police chief that the gas company had a right of way in the area in question and that the Pulices were not permitted to obstruct it. The solicitor told the police chief that the Pulices should be arrested if they persisted in their obstructionist tactics.

Following the incident in question, Petitioner was charged with disorderly conduct per 18 Pa.C.S. §5503(a)(1), resisting arrest per 18 Pa.C.S. §5104, simple assault per 18 Pa.C.S. §2701(a)(3) and obstructing a highway or other public passage per 18 Pa.C.S. §5507(a). She pled guilty to simple assault. She also pled guilty to obstructing a highway or other public passages after said charge, which is a third degree misdemeanor, was reduced to a summary violation. As a result of these guilty pleas, Petitioner was placed on

adult probation for one (1) year and was ordered to undergo a mental health evaluation.

PETITIONER HAS FAILED TO SET FORTH A COMPELLING REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI

Granting a Petition for Writ of Certiorari is within the Court's discretion and is usually granted where there is a conflict among the Circuit Courts on the same important matter, where a state court of last resort has decided an important federal question in a way that conflicts with the question of another state court of last resort or of a United States Court of Appeals or where an important question of federal law has been decided by another court that has not been but should be settled by the U.S. Supreme Court or has made a decision that is in conflict with a US Supreme Court decision. U.S. Supreme Court Rule 10. Petitioner has raised two areas where she believes the Third Circuit Court has erred. First, Petitioner states that she believes that the Circuit Court applied an improper standard of review to the Motions for Summary Judgment that were filed in the trial court. Second, Petitioner believes that the lower courts have misapplied the holding of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001). These issues will be addressed more fully below. However, neither of them sets forth an issue that indicates that there is a conflict among the circuits on an important federal issue of law or that there is a conflict with a decision rendered by this Honorable Court.

SUMMARY JUDGMENT STANDARD OF REVIEW

Petitioner suggests that the lower courts applied an improper standard of review in determining Respondents' Motion for Summary Judgment by making factual and credibility determinations where there were disputed and

contested issues of fact. A careful review of the record shows that Petitioner conducted no discovery in this case at the trial court level. As the trial court points out, Petitioner's case rests almost entirely upon a series of unsubstantiated, conclusory statements and the allegations set forth in the Amended Complaint.

The lower courts did not make factual and credibility determinations as alleged by Petitioner. Rather, the lower courts made their decisions based upon the evidence of record as a whole. Summary judgment is appropriate where the moving party can demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position will be insufficient. There must be evidence on which the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252. The court must view the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. The trial court is not required to treat Petitioner's allegations as being true where the Respondents' properly supported motion for summary judgment provides hard evidence that the allegations against them in the Complaint are demonstrably false. See, *Skousen v. Brighton High School*, 305 F.3d 520, 528 (6th Cir. 2002).

In order to defeat a motion for summary judgment, the non-moving party must do more than rest on mere

allegations, allusions to facts or references to pleadings. Rather, the non-moving party must offer specific material evidence that not only contradicts the evidence presented by the moving party but is also sufficient to establish the existence of a material factual dispute that must be decided at trial. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). In this case, both the videotape evidence and Petitioner's medical records contradict her assertion that she was brutally beaten and Petitioner has not introduced any evidence to the contrary. Petitioner has also failed to introduce evidence that contradicts Respondents' assertion that Petitioner attempted to obtain an officer's gun after she and her family were placed under arrested. Although there are some disputes as to the facts, the material facts, as supported by evidence relied on by both Petitioner and Respondents, are not in dispute. Further, Petitioner has not presented evidence to establish the existence of a material fact that must be decided at trial. Therefore, summary judgment was properly granted to Respondents in this case.

QUALIFIED IMMUNITY

The Circuit Court properly affirmed the District Court's determination that the individual officers involved in arresting Petitioner on December 5, 1997 are entitled to qualified immunity. Pursuant to the decision in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in order to determine whether an officer is entitled to qualified immunity, the court analyzed the specific facts of the case before it. The relevant dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation that he confronted. An officer is entitled to qualified immunity from claims of excessive force where a reasonable person in the officer's

position could have believed the degree of force employed to have been reasonable. *Rogers v. Powell*, 120 F.3d 446 (3rd Cir. 1997); *Fortunato v. Handler*, 969 F. Supp. 963, 968 (W.D. Pa. 1996). The inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is distinct from the inquiry on the merits of the excessive force claim. If an officer is mistaken regarding the amount of force that is legal, but such mistake is reasonable, then the officer is entitled to the immunity defense. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2158-2159.

Government officials performing discretionary functions within the scope of their employment are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997); *Fortunato v. Handler*, 969 F.Supp. 963 (W.D. Pa. 1996). Qualified immunity from a civil rights action is an entitlement not to stand trial or face the other business of litigation. The privilege of qualified immunity is an immunity from suit rather than a mere defense to liability. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

A court required to rule on qualified immunity of a government official in a civil rights action must first consider, as its initial inquiry, whether the facts alleged, taken in a light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156. If the court determines that a favorable view of the plaintiff's alleged facts show that the official's conduct violated a constitutional right, the court's next step is to ask whether such right was clearly established. In making this

determination, the court must analyze the specific facts of the case pending before it. The relevant dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation that he confronted. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156. If the law did not put the official on notice that his conduct would be clearly unlawful, then summary judgment based on qualified immunity is appropriate. *Id.*

Under the Fourth Amendment, the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat to effect it. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-1872, 104 L.Ed.2d 443 (1989). The *Graham* court recognizes that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and the calculus for reasonableness must allow for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872.

As the lower courts indicate, Petitioner's allegations in her Complaint are sufficient to set forth the possibility of a constitutional violation based simply on the general rule prohibiting excessive force. However, Petitioner has failed to produce any evidence of record to support her claims. To the contrary, the evidence of record overwhelmingly supports the proposition that no excessive force was used against Petitioner by any of the officers. The right to use a certain degree of force must be carefully analyzed in light of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or

attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1872.

In this case, the evidence of record is clear that the Allegheny Township police officers did not use excessive force when they arrested Petitioner. Petitioner escalated the situation the officers faced when she attempted to grab a gun from one of the officer's holsters. As the situation escalated, the officers initially had no idea whether Petitioner actually obtained the weapon or what she planned on doing with it once she obtained it. Petitioner's actions in actively resisting arrest and in attempting to take an officer's gun placed every person in the immediate vicinity in danger and the officers were required to use a significant amount of force to restore order and gain control of the situation. The fact that the officers would not permit Petitioner to get up once they had her face down and that one of the officers had his knee in her back is reasonable from the perspective of the officers at the time. The officers, who were surprised once by Petitioner's attempt to obtain an officer's gun, had no idea of Petitioner's intentions or what her actions would be if she had been permitted to get up once she had been subdued by the officers. The officers' actions, in taking Petitioner into custody, placing her on the ground, refusing to permit her to get up and handcuffing her were objectively necessary in order to control the scene and to prevent harm to the officers and to the numerous bystanders in the area. Under the rationale of *Saucier*, the officers are entitled to qualified immunity and the lower courts' decisions concerning qualified immunity are consistent with the decisions of the other Circuit Courts in their interpretation of *Saucier* and its progeny. Further, the lower courts' decisions were not in conflict with any decisions rendered by this Court concerning qualified immunity as it applies to Fourth Amendment claims.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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